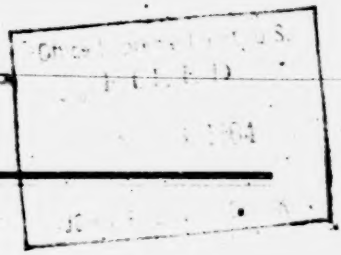

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 1235 1963

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MOUNT HOLLY-BURLINGTON BROADCASTING COMPANY, INC.,

*Petitioner,*

v.

WILLIAM S. HALPERN & LOUIS N. SELTZER d b as BURLINGTON BROADCASTING CO.,

*Respondent*

and

FEDERAL COMMUNICATIONS COMMISSION,

*Respondent*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioner, Mount Holly-Burlington Broadcasting Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 19, 1964, remanding to the Federal Communications Commission for further proceedings the Commission's decision and order granting

the application of petitioner for a new standard broadcast station in Mount Holly, New Jersey.

## OPINIONS BELOW

The decision and order of the Federal Communications Commission are reported at 34 FCC 1135 and are printed in Appendix A hereto, *infra*, pp. 15-38. The opinion of the Circuit Court of Appeals for the District of Columbia Circuit has not yet been reported and is printed in Appendix B, hereto *infra*, pp. 39-42.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 19, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## QUESTION PRESENTED

Whether in rejecting the findings of fact and conclusions of law of the Federal Communications Commission, and in remanding the case to the Commission for further proceedings, the court below improperly extended the scope of review by an appellate court of a final decision and order of an administrative agency.

## STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151, *et seq.*, and of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1001, *et seq.*, are printed in Appendix C hereto, *infra*, pp. 43-46.

## STATEMENT

Petitioner was one of three applicants before the Federal Communications Commission for a radio station in

the Mount Holly-Burlington, New Jersey area.[1] Since by reason of the mutually-destructive interference only one of the applications could be granted, they were set for consolidated hearing before an examiner in accordance with the provisions of Section 309(e) of the Communications Act, 47 U.S.C. § 309(e). After a full hearing, the examiner issued an initial decision proposing to grant the application of an applicant no longer a party to these proceedings. Petitioner and respondent Halpern & Seltzer d b as Burlington Broadcasting Company, appealed to the full Commission by the filing of exceptions. Following oral argument before the Commission *en banc*, the Commission issued a decision granting petitioner's application. Respondent Halpern & Seltzer appealed to the United States Court of Appeals for the District of Columbia Circuit pursuant to the provisions of Section 402(b) of the Communications Act, 47 U.S.C. Section 402(b). On March 19, 1964, the Court issued an opinion (Judge Wright concurring) remanding the case to the Commission for further proceedings.

Among the matters at issue before the Commission were (1) whether John J. Farina was the real party in interest; (2) whether Farina had misrepresented the location and source of the funds he proposed to utilize in the construction and operation of the station; and (3) whether Farina had contacted some 150 persons in connection with his proposed programming as he had alleged.

With respect to the real party in interest issue, the examiner noted that there was "no scintilla of evidence

[1] The applicant before the Commission was John J. Farina, trading as Mt. Holly-Burlington Broadcasting Company. However, following the Commission's action granting Farina's application, the construction permit was assigned pursuant to Commission consent to petitioner [redacted] petitioner was substituted as intervenor in the proceedings in the court below. Petitioner corporation is wholly owned by Farina except for qualifying shares held by two members of his immediate family.

that any person other than Farina [was] interested in his application . . ." and concluded that Farina was indeed the real party in interest.

With respect to Farina's financing, the examiner found that Farina actually had $54,000 in cash as represented to the Commission and concluded that he was financially qualified. However, the examiner stated that Farina had misrepresented in his application that the said $54,000 was on deposit in a named bank when the bulk of the funds were kept in a receptacle in Farina's home in light of his parents' apprehension about placing their savings in banks.[2]

[2] Farina gave the following responses to questions in his application with respect to proposed financing:

"1.c. The proposed construction is to be financed and paid for in the following manner (including specified statements as to the approximate amount to be met and paid from each source). The financial plan should provide for any additional construction costs should the actual cost exceed the original estimated cost, and also for the early operation of the station in the event operating expenses should exceed operating revenues:

| Existing Capital | New Capital | Loans from banks or others | Profits existing operations |
|---|---|---|---|
| 'In excess of $54,000' | | | |
| Donations | Credits, deferred payments, etc. | | Other sources (specify) |
| | '$36,000.' | | |

* * * *

"3. Furnish the following information with respect to the applicant only. If the answer is 'None' to any or all items, specifically so state:

"a. 'Amount' of funds on deposit in bank or other depository
'In excess of $54,000'

"b. Name and address of the bank in which deposited
'Fidelity Union Trust Newark, N. J.'"

With respect to Farina's programming contacts, the examiner opined that "a weakness in the Farina endeavor is displayed by the controverted testimony of four witnesses [who] all categorically disputed Farina's testimony that he had contacted them respecting his proposal at Mount Holly"; and the examiner submitted that if the foregoing were "a fair sampling of the contacts Farina allegedly made . . . doubt readily appears as to the thoroughness, conclusiveness and reliability of the evidence respecting the Farina contacts."

The Commission affirmed the examiner's findings and conclusions that Farina was the real party in interest and was financially qualified. Moreover, with respect to Farina's financial representations, the Commission reversed the examiner, holding that Farina was not guilty of any misrepresentation. The Commission stated as follows:

> "Findings 104, 106 and 110 are corrected to show that Farina represented in his application, in response to Item 3a of Section III, that he had 'In excess of $54,000' 'on deposit in [a] bank or other depository', and that, to the extent that it was on deposit in a *bank* (Item 3b), as distinguished from other depositories, it was in 'Fidelity Union Trust, Newark, N. J.' In fact, he had a small sum in Fi-

"c. Name and address of the party in whose name the money is deposited

'John J. Farina, 321 Summer Avenue, Newark, N. J.'

"d. Conditions of deposit (in trust, savings, subject to check, on time deposit, who may draw on account and for what purpose, or other condition)

'Savings and checking accounts may be drawn upon by John J. Farina for any purpose'

"e. Whether the funds were deposited for the specific purpose of constructing and operating the station

'No.'"

delity Union Trust, and more than $53,000 in a cache in his parents' home. *The somewhat ambiguous nature of questions 5a and b of Section III of the application (in that question 5b assumes that the amount described in 5a is deposited in a bank), combined with the total absence of any motive or evidence of intent to mislead the Commission, persuades us that Farina was not guilty of misrepresentation.*" (Italics added)

The Commission also reversed the examiner's findings and conclusions regarding Farina's programming contacts, stating as follows:

"Farina listed 151 persons whom he had contacted in the preparation of his application. That an opposing applicant was able to present 4 of the named individuals to testify that they had no recollection of having met or talked with Farina does not seriously detract from the validity of the remaining 147 contacts. *Moreover, the record as a whole supports the conclusion that Farina did in fact talk to the four named individuals.* Thus, while two persons—Amos Hope and Nils Johnson—testified that they do not remember talking to Farina, they conceded that such a conversation might have taken place. Additionally, Dr. and Mrs. Bisbee, Mount Holly residents who assisted Farina in making local contacts, specifically testified as to their having placed calls for Farina from their home to Hope and Johnson, and Mrs. Bisbee recalled calling the office of Miss Symonds, although she did not know the name of the woman with whom Farina spoke there. Miss Symonds and Clarence Marshall, the latter a Sleeper employee for 16 years, both denied having ever spoken with Farina. It must not be overlooked that the contacts in question occurred in 1959, and the testimony with respect thereto was received in November 1961. Also, Farina's purpose in making the contacts was to familiarize himself with the community and to determine its needs and desires, a goal capable of be-

ing realized without mention of his own name or of his intent to seek a radio station, and it is hardly surprising that some of those contacted may have been unable to recall the event over two years later."

The Commission thereupon proceeded to consider the applicants on comparative criteria and on such basis concluded that a grant to Farina would best serve the public interest, convenience, and necessity. The Commission stated as follows:

"Thus, Farina has been preferred for preparation, planning, and programming; integration; and diversification. County has won a preference for its area familiarity, and Halpern-Seltzer, for broadcast experience. While Farina lacks area familiarity, as defined in paragraph 21, *supra*, his extensive contacts and planning indicate more than the typical non-resident's awareness of community needs. Neither is he devoid of experience in broadcasting, for his years spent in NBC's program division as a 'Qualified Production Assistant', should stand him in good stead in developing programming for his own station. Thus, Farina has offered abundant assurance in several criteria, and adequate assurance in each of the others, that a program proposal serving the public interest will be effectuated, and that he may be expected to operate throughout his license term in the public interest. On the other hand, both County and Halpern-Seltzer have shown weaknesses with respect to one or more of the criteria. The former's lack of experience and the latter's lack of area familiarity have not been compensated by showings under other factors. County offers only area familiarity and partial integration, unreinforced with a strong showing of preparation to compensate for lack of experience. Similarly, Halperin-Seltzer did little to cure their lack of familiarity with the area to be served and offer us only an experienced broadcaster (with a 'satisfactory' record) and partial integration."

On appeal, the court below rejected the Commission's findings and conclusions in significant respects. The court stated:

> "Viewing the record as a whole, we cannot escape the conclusion that the Commission failed to make or require adequate inquiry into that subject. As a minimum the Commission should upon remand have the Examiner inquire into (a) corroboration by Farina's parents or others having actual knowledge of the alleged family arrangements for custody of the $53,000 or $54,000 when the application was executed by Farina; (b) full inquiry into Farina's financing arrangements for future operations; (c) inquiry into the detail of organizational expenses alleged by Farina; (d) inquiry into Farina's surveys on community needs by some means which will satisfy the Commission that interviews claimed were in fact conducted substantially as alleged."

The court added that while it did "not intend to intimate a view that the cash available to Farina is not his own or that his proposed financing program is not appropriate", it believed that "the present record is inadequate for anyone to make valid conclusions." The case was therefore remanded to the Commission "for the development of a more adequate record" in further proceedings, with the court retaining jurisdiction.

In his concurring opinion, Judge Wright observed:

> "It is with some reluctance that I concur in the court's opinion. *The matters which are to be reinvestigated on remand have already been passed on by the Commission, and they are matters which fall within its competence. Moreover, I agree with the Commission that its questionnaire is ambiguous, and it is understandable why an applicant would not want to disclose in a public record that there was $53,000 in cash in a receptacle in his home. Never-*

theless, further inquiry by the Commission may clear the air and dispel some of the doubts" (Italics added).

## REASONS FOR GRANTING THE WRIT

1. The court below has improperly extended the scope of judicial review of an action by an administrative agency in contravention of this Court's holding in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474. Section 10 of the Administrative Procedure Act, 5 U.S.C. Section 1009, provides that in passing on agency action, "the court shall review the whole record . . ." In *Universal Camera* the Court outlined the function of a reviewing court under this standard, as follows:

> "To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. *Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.* Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." (Italics added) (340 U.S. 474, at 488).

While the Court has made clear that its power to review the correctness of application of the foregoing standard ought seldom to be called into action, the Court cautioned in *Universal Camera* that it would intervene in "the rare instances when the standard appears to have been misapprehended or grossly misapplied." 340 U.S. 474, 491. The instant case presents such an instance.

2. For example, the Commission affirmed the examiner's finding that there was "no scintilla of evidence that any person other than Farina is interested in his application here under consideration." Nevertheless, despite the fact that this aspect of the Commission's decision was not even challenged on appeal, the court below in directing further proceedings before the Commission, states that "the need to know that the financing of Farina's project was not from some undisclosed principal requires this subject [Farina's financing] to be explored more fully than was done." Surely, the Commission acted reasonably and within its discretion in finding Farina to be the sole party in interest in his application.

3. Similarly, the court improperly rejected the Commission's findings and conclusions with respect to Farina's financing. Thus, the examiner found that Farina actually had $54,000 in cash, as he had claimed, and concluded that he was financially qualified. The examiner went on to note, however, that in responding to the questions posed in the Commission's application form, Farina had misrepresented that all of the said funds were on deposit in a named bank when in point of fact the bulk of the funds were kept in a receptacle in Farina's home because of his parents' apprehension about placing their savings in banks. The Commission, in its consideration of the record, reversed the examiner in this respect, holding that Farina was not guilty of any misrepresentation. The Commission found that the misinformation with respect to the locus of Farina's funds stemmed not from any intent on Fa-

rina's part to mislead the Commission, but from the "somewhat ambiguous nature" of the questions in the Commission's own application form. This fact, the Commission stated, "combined with a total absence of any motive or of evidence of intent to mislead the Commission, persuades us that Farina was not guilty of misrepresentation." Ignoring this Court's doctrine that an administrative agency is the best judge as to the meaning and interpretation of its own rules, *Bowles* v. *Seminole Rock and Sand Co.*, 325 U.S. 410, the court below rejected the Commission's findings and conclusions out of hand and ordered further extensive hearings on this aspect of the case, as follows:

> "As a minimum the Commission should upon remand have the Examiner inquire into (a) corroboration by Farina's parents, or others having actual knowledge of the alleged family arrangements for custody of the $53,000 or $54,000 when the application was executed by Farina, (b) full inquiry into Farina's financing arrangements for future operations; (c) inquiry into the detail of organizational expenses alleged by Farina . . ."

It becomes clear from a reading of the court's opinion that, in rejecting the Commission's determination with respect to Farina's proposed financing, the court grossly misapplied the standard of *Universal Camera* and improperly substituted its own judgment for that of the expert body empowered by Congress to perform essential functions in its field.

4. Finally, in the matter of Farina's programming contacts, the examiner felt that Farina's showing on programming preparation should be discredited since four of the more than 150 persons listed as having been con-

In a concurring opinion, Judge Wright stated that he agreed "with the Commission that the questionnaire is ambiguous . . ."

tacted by him in this respect, testified they were not so contacted. The Commission, however, on the basis of its independent evaluation of the record, found that "the record as a whole supports the conclusion that Farina did in fact talk to the four named individuals". The Commission pointed out that, although four witnesses testified they could not recall having been contacted by Farina, "it must not be overlooked that the contacts in question occurred in 1959, and the testimony with respect thereto was received in November 1961" and that "Farina's purpose in making the contacts was to familiarize himself with the community and to determine its needs and desires, a goal capable of being realized without mention of his own name or of his intent to seek a radio station, and it is hardly surprising that some of those contacted may have been unable to recall the event over two years later." The Commission noted that the fact "that an opposing applicant was able to present four of the named individuals to testify that they had no recollection of having met or talked with Farina does not seriously detract from the validity of the remaining 147 contacts." Further, the Commission pointed out that two of the four witnesses conceded that while they did not remember talking to Farina, such conversations might have taken place; and that two Mount Holly residents who assisted Farina in making local contacts, specifically testified as to their having placed calls for Farina from their home to a number of the witnesses. Weighing all of the foregoing factors, the Commission concluded that the preponderance of the evidence established that Farina had in fact made the disputed contacts. Here again, in contravention of *Universal Camera*, the court below rejected the Commission's findings out of hand and directed the Commission to hold an "inquiry into Farina's surveys on community needs by some means which will satisfy the Commission that interviews claimed were in fact conducted substantially as alleged."

5. Certiorari is warranted in this case since if the rationale of the decision below is allowed to stand, the exercise of essential duties of administrative agencies generally will be seriously and significantly hampered. In substituting its own judgment for that of the expert agency, the court below has gone beyond the proper scope of its review function under Sections 402(b)(c) and (g) of the Communications Act, 47 U.S.C. § 402(b) and (g) and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009. *Gray* v. *Powell*, 314 U.S. 402. Indeed, the decision of the court below may properly be characterized by this Court's observation in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 73, that:

> "The findings of the Commission as to facts, if supported by testimony, shall be conclusive." * * * the Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding of unfair competition had no support whatsoever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences * * *."

This Court has on a number of occasions regarded the departure by a court of appeals from the accepted principles of judicial review and the substitution of its views for those of an administrative agency as sufficient to warrant the granting of a writ of certiorari. See, *e.g.*, *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 586; *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 208; *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105; *National Labor Relations Board* v. *Automatic Maintenance Machinery Co.*, 315 U.S. 282; *National Labor Relations Board* v. *Southern Bell Telephone Co.*, 319 U.S. 50. When, as here, the court involved is one playing so vital a role in the review of administrative action, there

is even more need for supervision by this Court. For, the court below not only has exclusive jurisdiction of appeals from Commission decisions granting or denying radio station licenses under Section 402(b) of the Communications Act, but is also strategically placed for the review of numerous other administrative orders. The decisions of that court are thus of major importance in the administrative field.

## CONCLUSION

The decision below constitutes an improper extension of the scope of review by an appellate court of a final decision and order of an administrative agency. It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June , 1964

## APPENDIX A

IN RE APPLICATION OF

Docket No. 13931
File No. BP-12580

WILLIAM S. HALPERN AND LOUIS N. SELTZER DBA
BURLINGTON B CASTING CO.
BURLINGTON, NEW JERSEY

Docket No. 13932
File No. BP-13871

BURLINGTON COUNTY B CASTING CO.
MOUNT HOLLY, NEW JERSEY

Docket No. 13933
File No. BP-13952

JOHN J. FARINA TRA
MT. HOLLY-BURLINGTON B CASTING CO.
MOUNT HOLLY, NEW JERSEY

FOR CONSTRUCTION PERMITS

APPEARANCES

Philip Bergson, Esq. and Arthur Scheiner, Esq. for Burlington Broadcasting Company; Donald E. Bilger, Esq. and Harold E Mott, Esq. for Burlington County Broadcasting Company; Benito Gaguine, Esq. and Joseph J. Kessler, Esq. for Mt. Holly-Burlington Broadcasting Company; Seymour M. Chase, Esq. for Eastern Broadcasting Company (WFPG); Benedict P. Cottone, Esq. for O'Keefe Broadcasting Company (WBCB) and Ernest Nash, Esq. and Richard E. Ely, Esq. for Chief, Broadcast Bureau, Federal Communications Commission.

## DECISION

By the Commission; (Commissioner Bartley concurring and issuing a statement; Commissioners Lee, Cox and Loevinger not participating.)

1. This proceeding involves three mutually-exclusive applications, those of William S. Halpern and Louis N. Seltzer dba Burlington Broadcasting Company (Halpern-Seltzer), Burlington County Broadcasting Company (County), and John J. Farina tra Mt. Holly-Burlington Broadcasting Company (Farina). Each seeks a permit to establish a new Class III standard broadcast on 1460 kc, 5 kilowatts, DA-2 unlimited time—Halpern-Seltzer in Burlington, New Jersey, and County and Farina in Mount Holly, New Jersey.

2. Thirteen issues were specified, including issues to determine (a) compliance by each of the proposals with § 3. 24(b) of the Rules, and whether each would adequately cover the principal city, in view of their nighttime limitations of 22. 4 mv/m; (b) compliance by Halpern-Seltzer and Ferina with § 3. 188(b)(1) of the Rules; (c) Farina's compliance with § 3. 37 of the Rules (25 mv/m contour overlap); (d) Farina's financial qualifications, and whether there exists a concealed party-in-interest to the Farina application; (e) applicability of 307(b); and (f) which of the applicants is comparatively superior.

3. Examiner Kyle, in an Initial Decision released May 2, 1962 (FCC 62D-39; Mimeo No. 19451), proposes to grant County's application, concluding that all applicants comply with § 3. 188(b)(1) and (2) of the Rules, that Farina complies with § 3. 37 of the Rules, that Farina is the real party-in-interest to his application and is financially qualified, that Farina misrepresented to the Commission the location of his funds, that Mount Holly is to be preferred to Burlington under 307(b) of the Act, and that, despite the nighttime interference suffered by the pro-

posals, the provisions of § 3. 24(b) of the Rules should be waived in order that Burlington County may receive its first local station. Exceptions were filed by Halpern-Seltzer, Farina, and the Bureau, and oral argument was held before the Commission en banc on April 11, 1963. The Commission's rulings on the exceptions are contained in the appendix hereto. We have reviewed the Examiner's findings of fact in light of the exceptions, and are of the view that they are substantially accurate and complete. Accordingly, they are adopted, with the modifications noted herein and in the appendix. However, the Commission views those findings as warranting substantially different conclusions on several major issues, and a different ultimate result, as set forth infra.

4. Several of the Examiner's preliminary conclusions are basically correct and fully supported by the record, and are therefore adopted. These are that (1) none of these proposals will cause additional interference to any existing station; (2) Farina will comply with § 3. 37 of the Rules[1]; (3) Halpern-Seltzer and Farina will comply, or substantially comply, with the city coverage requirements of § 3. 188(b)(1) of the Rules[2]; and (4) Farina is financially qualified[3] and the real party-in-interest to his application.

5. Before turning to the 307(b) and standard comparative issues, one further question of basic qualification remains. Issue 5 herein poses the question whether, by virtue of the extreme nighttime interference to be suffered by these proposals, they would satisfy the requirements of § 3. 24(b) of the rules that service not be "reduced to an unsatisfactory degree." The Examiner concluded

[1] See our ruling on Halpern-Seltzer exceptions 21, 35, 41, and 45.

[2] See ruling on Farina's exception 62.

[3] See ruling on Halpern-Seltzer's exception 48.

that although the rule was violated, waiver thereof was warranted. The Bureau excepts urging that all applications be denied.

6. Nighttime interference will limit each proposal to its 22.4 mv m contour. The populations within each applicant's normally protected 2.5 mv m contour which would be affected by such interference would range from 82.5% to 87.6% of the total populations within the 2.5 mv m contours, and in excess of 80% of the area within each applicant's 2.5 mv m contour would be so affected. A grant of any of these applications would not raise the nighttime RSS limitation of any existing station, increase the limitations of possible nighttime operations by existing daytime stations on the channel, or increase the limitation to any area where a daytime facility might be allocated in the future.[1]

7. The Examiner's determination to waive § 3.24(b) here was based on the needs for a local station in Burlington County, New Jersey, and in reliance upon the Commission's decisions in Suburbanaire, Inc., 29 FCC 953, 19 RR 1227 (1960); and KDEF Broadcasting Company, 30 FCC 635, 20 RR 684 (1961). Since his Initial Decision, however, the Commission has had occasion to distinguish those cases from the type presented here, and to more clearly define § 3.24(b) of the rules in this regard: see Asheboro Broadcasting Company, 34 FCC 155, 24 RR 848 (1963), and Strafford Broadcasting Corp., 34 FCC

[1] The foregoing facts, seemingly favorable to a grant here, are based on the Commission's Rules which provide that in computing nighttime interference, certain signals of lesser intensity will be excluded. It is through such an exclusion that these proposals would fail to raise RSS limits of existing and feasible future stations on the channels. Thus, it should be recognized that any nighttime operation will have some deleterious effect upon other nighttime stations on the channel, even though its contribution to the total interference picture would be excluded from consideration by the Commission's Rules.

142, 21 RR 835 (1963). The operative language of the latter case is as follows:

> "Thus, §§ 3.24(b) and 3.28(d)(3) of the rules, read together, stand for the proposition that an applicant proposing no more than 10 percent population interference may be granted if otherwise basically qualified, but that one who must reply on an exception to the latter rule may be granted only if the populations affected by the received interference are not so large that his service would be "reduced to an unsatisfactory degree." The determination of "unsatisfactory degree" depends upon a number of factors—including coverage of the principal community, availability of other services, effect upon the use of the channel at other locations, and interference to be caused to existing operations . . ."

The Asheboro applicant would have suffered nighttime interference affecting 35.4% of its normally-protected population, but would provide a first nighttime primary service to 11,000 persons and a second such service to 6,300 persons. The Stafford applicant was to receive nighttime interference affecting 66.1% of its normally-protected population, but it, too, was to provide a first and second primary service to 22,500 and 15,000 persons, respectively.

8. Each of the proposals before us would receive a substantially greater proportion of nighttime interference than the operations authorized in Stratford and Asheboro, and, significantly, would cure no white or gray areas, the areas proposed to be served nighttime receiving a minimum of five primary signals. While grant of any one of these proposals would have no legally-recognized effect upon present or potential use of the channel elsewhere,

But see paragraph 6, supra, with regard to the actual degradation which will occur, vis a vis legally-recognized contributions to IRSS limitations.

and would satisfactorily serve the communities of Burlington and Mount Holly (neither of which presently has a local nighttime transmission service), the high proportion of interference which each will receive coupled with the abundance of other reception services persuades the Commission that each nighttime proposal is violative of § 3.24(b); i. e., that the service of each would be "reduced to an unsatisfactory degree." Thus, to the extent that these proposals seek to operate nighttime, they will be denied, and the Commission will grant daytime-only authority to the applicant found hereinafter to be superior to the others.[9]

Section 307(b) Considerations

9. Issue 8 herein questions whether Section 307(b) considerations are applicable, and whether a choice herein can be reasonably based thereon. Burlington and Mount Holly are both located in Burlington County (1960 population 224,499) located across the Delaware River from Philadelphia. No radio or television stations are presently licensed in the county. Burlington City (1960 population 12,687) is the only incorporated city of over 10,000 in the county. Its population growth during the decade 1950-1960 was 6%. Its future growth is geographically restricted, and its Planning Board hopes to restrict its population to 15,000. Mount Holly is an urban township with a 1960 population of 13,271, a 61% increase from its 1950 population. It is the county seat, and is located 4.6 miles from Burlington (border-to-border). Fort Dix and McGuire Air Force Base are nearby, and approximately one-third of Mount Holly's population is military. Each of these proposals would substantially comply with

[9] Each of the applicants stated at oral argument that they [illegible] would accept a daytime-only grant and recognized that his rival might also be given such a daytime-only grant (See Tr. 2226, 2227, 2251, 2257).

the principal city coverage requirements of § 3.188(b), of the Rules with respect to both communities. The Examiner concluded that "Mount Holly is capable of providing significantly greater resources for programming talent and material than is Burlington [and] is superior . . . in the matters of rate of growth, civic activities, population, business, governmental and agricultural activities, educational facilities and potential growth", and that a first facility in Mount Holly would provide a more fair, efficient, and equitable assignment.

10. Bureau and Halpern-Seltzer except, urging that the communities are inseparable for 307(b) purposes. Halpern-Seltzer cites Kent-Ravenna Broadcasting Co., 22 RR 605 (1961), and Bureau, Rossmoyne Corp., 7 RR 117 (1951). Halpern-Seltzer, moreover, claims a 307(b) preference for its greater coverage, in that it would serve 295,000 persons more than County and 340,000 more than Far . The additional population to be served by Halpern-Seltzer, however, presently receives at least eight primary services, and has no significant need for more. The Commission agrees with Bureau that 307(b) considerations are not determinative, in view of the proximity and similarity of the communities involved, the regional channel at issue, the similar coverage of the proposals, and the already well-served reception areas of each. Accordingly, we must turn to the comparative issue.

The Standard Comparative Issue

11. The applicants' showings under the various comparative criteria will be discussed in the following order: (A) Preparation and Planning, Policy, and Proposed Programming; (B) Equipment, Studios, and Staff; (C) Likelihood of Effectuation, including Area Familiarity, Integration of Ownership with Management, Broadcast Experience, and Past Broadcast Record; and (D) Di-

versification of Ownership of Mass Communications Media.

(A) Preparation and Planning, Policy, and Programming

12. Preparation and Planning. The Examiner concluded that the "efforts of all three applicants . . . leave much to be desired as to their endeavors to genuinely ascertain the needs of the Burlington-Mount Holly area respecting programming." The Halpern-Seltzer program proposal is based principally upon their experience in operating Station WCOJ, Coatesville, Pennsylvania, although Halpern made approximately 96 post-designation contacts in the Burlington area, and Seltzer had studied the area's statistics prior to designation. County's program proposal was developed by a paid consultant, who worked from the offices of Sleeper (County's president) and Freeman (its Secretary-Treasurer) and consulted with them during his work. County's legal counsel also advised them in this regard. The incorporators made an insubstantial number of contacts prior to filing the application, and formed a Program Advisory Committee consisting of a minister, a superintendent of schools, and an attorney, who will meet at least four times a year to review the station's programming. Farina's proposal results from a substantial number of contacts in 1959 and 1960. The Examiner deprecated Farina's contacts; noting that some were made nearer to Toms River (where Farina had helped one Zaccagnino with the latter's application) than Mount Holly. The Examiner further found that a "cloud . . . is cast upon some of the contacts" in that four named individuals testified that they had never been contacted by Farina, despite his claims to the contrary.

13. Toms River is 30 miles from Mount Holly and lies within Farina's proposed interference-free contour. Thus, contacts in the Toms River area, even though made with another proposal in mind, would be of use in acquainting

Farina with the needs of his service area. Moreover, it is to be noted that a regional channel is involved here, and contacts limited to the principal community may well be an inadequate basis for designing programs to meet area-wide needs.

14. Farina listed 151 persons whom he had contacted in the preparation of his application. That an opposing applicant was able to present four of the named individuals to testify that they had no recollection of having met or talked with Farina does not seriously detract from the validity of the remaining 147 contacts. Moreover, the record as a whole supports the conclusion that Farina did in fact talk to the four named individuals. Thus, while two persons—Amos Hope and Nils Johnson—testified that they do not remember talking to Farina, they conceded that such a conversation might have taken place. Additionally, Dr. and Mrs. Bisbee, Mount Holly residents who assisted Farina in making local contacts, specifically testified as to their having placed calls for Farina from their home to Hope and Johnson, and Mrs. Bisbee recalled calling the office of Miss Symonds, although she did not know the name of the woman with whom Farina spoke there. Miss Symonds and Clarence Marshall, the latter a Sleeper employee for 16 years, both denied having ever spoken with Farina. It must not be overlooked that the contacts in question occurred in 1959, and the testimony with respect thereto was received in November 1961. Also, Farina's purpose in making the contacts was to familiarize himself with the community and to determine its needs and desires, a goal capable of being realized without mention of his own name or of his intent to seek a radio station, and it is hardly surprising that some of those contacted may have been unable to recall the event over two years later.

15. With respect to the comparative showings of the applicants, it is apparent that only Farina's preparation

was reflected in his program proposal. Aside from culling a few statistics regarding the Burlington area, Halpern and Seltzer acquired no familiarity therewith until after the applications had been designated for hearing and the program proposals frozen. Similarly, the small amount of predesignation planning of the County principals was not reflected in their program proposal, which was the product of a hired consultant. Accordingly, Farina is awarded a significant preferance over his competitors in this area, and little basis is found for distinguishing between the others.

16. Policy. The Examiner made no findings or conclusions on the applicants' policies, and none has claimed a preference for its policies.

17. Programming. The Examiner concluded that the programming of all three applicants was similar, and awarded no preference. As noted above, Farina's proposals resulted in large part from contacts in the area. The findings heretofore adoped do not suggest similar connections with respect to the proposals of the other applicants. Farina claims a preference on this basis. The findings also show that the applicants propose live programming in the following percentages: Halpern-Seltzer, 16.4%; County, 30.0%; and Farina, 40.7%.

18. In the Commission's view, the programming of each applicant is well balanced and, if effectuated, would adequately serve the area. However, the demonstrated connection between Farina's contacts and his programming suggests that his planning and preparation have been superior and that he has demonstrated a greater likelihood, through good planning, that his proposal will be effectuated. Thus, consideration of these three elements—preparation, policy, and programming—indicates that Farina has presented the better proposal, and that County's and Halpern-Seltzer's proposals, though adequate, are comparatively weaker.

(B) Equipment, Studios, and Staff

19. The Examiner did not discuss the studio and equipment aspects of these proposals in his findings or conclusions, and no party has excepted thereto. As to staff, he noted that Halpern-Seltzer propose a staff of 14 or 15 employees; County, 15 employees; and Farina, 17. He concluded that "[t]here is nothing in the record to indicate how Farina can accomplish such a high percentage of live . . . presentations with only 17 employees."

20. Farina, in his exceptions, claims that his proposal is adequate, and that County's is inadequate. As noted above, Farina proposes 40% live, compared to County's 30%, and proposes two more employees than county. County's proposal includes seven persons in programming and technical positions, compared to eleven occupying similar positions for Farina. Were this comparison directed to the full-time operation, we would hold that there is no basis for finding the proposed staff of any of the applicants inadequate. It is our view that the applicants could effectuate their programming proposals with the respective proposed staffs. Clearly, this same conclusion is applicable to the daytime-only operation here granted. Indeed, in the light of the daytime-only basis of the grant the applicants perhaps now have some leeway or "surplus" in their staff proposals, and therefore might now find it appropriate to scale down somewhat their staff proposals. We conclude here, as we have in the great majority of our comparative cases, that each of the staffing plans is adequate to effectuate the respective proposals and that, therefore, no preference is awarded in this category.

(C) Likelihood of Effectuation

(1) Area Familiarity

21. This composite factor takes into account the extent to which an applicant may be presumed aware of its com-

munity's needs through residence therein and participation in its civic and business activities. County is entitled to a clear-cut preference in this category, for the local residence of its principals is as complete as that of its competitors is lacking. Farina has spent virtually his entire life in Newark, New Jersey, while Halpern and Seltzer reside in Coatesville and Downington, Pennsylvania, respectively. In view of the clear preference awarded County here, the extent to which its principals manifest civic activity or diverse business interests becomes less significant, but it is noted that three of its four individual principals have records of participation in local civic affairs.

(2) Broadcast Experience and Past Record

22. Halpern-Seltzer, who have owned and operated Station WCOJ, Coatesville, Pennsylvania, since 1949, are conceded by the other applicants as deserving a first preference here. Farina is preferable to County in this regard by virtue of his employment in the program division of the National Broadcasting Company since 1947. Mr. Freeman, a 10% owner of County, is its only principal with any broadcast experience, and this was gained during a brief period of employment with Station WFBG, Altoona, Pennsylvania, nearly thirty years ago. Farina's longer and more current experience thus entitles him to be preferred to County in this area.

23. Only Halpern-Seltzer have a past broadcast record—gained chiefly at Station WCOJ, Coatesville, Pennsylvania, whose operation the Examiner characterized as "satisfactory." Farina urges that the WCOJ record is "exceedingly mediocre", and that the Halpern-Seltzer preference for broadcast experience be diminished accordingly.

24. In this regard, the record reveals (a) that WCOJ failed in some cases to log the beginning or the ending

time of spots; and (b) that its 1957 renewal application proposed 830 spots weekly whereas its 1960 renewal application showed that 1232 spots were broadcast during the composite week. On the other hand, the record contains considerable evidence favorable to the WCOJ operation, and it must be assumed that the Examiner considered all the evidence before concluding that, ovefall, its record was 'satisfactory.' While we do not countenance the derelictions noted above, we shall not burden the instant decision with a prolonged discussion of the matter, which is of less than decisional significance here. Thus, the generally satisfactory nature of the WCOJ record does not significantly affect the preference accorded Halpern-Seltzer for its broadcast experience, supra.

(3) Integration of Ownership and Management

25. Seltzer proposes to move to Burlington and to be general manager responsible for day-to-day operation, and Farina proposes the same type of integration. Three of County's principals propose to be integrated: Freeman, as assistant general manager (full time); Sleeper, with respect to public service and educational programming (30 hours weekly); and Walton, in public relations and sales work (15 hours weekly). The Examiner awarded Farina a first preference here, and rated County superior to Halpern-Seltzer, viewing Seltzer's proposal as in conflict with representations made to the Commission in other applications. He noted that "Seltzer conceded that he was to spend some time at Hammonton, [WNJH] where there is a manager . . ."

The better procedure, of course, would have been for the Examiner to make specific findings concerning the WCOJ operation and then to state his ultimate conclusion thereon. The matter is not critical to our decision however, Halpern-Seltzer not having excepted to the Examiner's conclusion.

26. Both Farina and Halpern-Seltzer except to the Examiner's crediting County's proposal in this area, principally on the ground that the participating principals lack the necessary experience to be integrated effectively. Halpern-Seltzer further excepts to the Examiner's finding of conflict among their proposals. While the Commission has given greater weight to integration of experienced principals, it has not held broadcast experience to be a prerequisite to meaningful integration. The ability of County's principals to devote time to the station, has not been seriously challenged, and the Commission finds their integration proposal to be realistic. Moreover, we find no conflict among the various Halpern-Seltzer proposals. In their Hammonton and Sommerville applications they represent that they "will exercise general supervisory control over the station," with Seltzer "directly responsible for the technical aspects of the operation"; (officially noticed). In both, however, they proposed to employ a general manager, who would have the immediate responsibility for day-to-day operations.

27. Thus, fully crediting the integration proposal of each applicant, we conclude that Farina's full-time integration entitles him to first preference, and that the full-time integration of a 50% partner of Halpern-Seltzer earns that applicant a slight edge over County, where one 10% owner (whose broadcast experience derives from a brief period of announcing and selling nearly thirty years ago) will be integrated full-time and two other minority stockholders without experience will be integrated part-time.

(D. Diversification of Ownership of Mass Communications Media

28. The Examiner awarded no preference in this area of comparison, although he made findings with respect thereto. The facts are that Farina has no ownership of other media; that Halpern-Seltzer own WCOJ Coatesville,

Pennsylvania, and WNJH Hammonton, New Jersey; and that County is connected with local newspaper interests. G. Howard Sleeper owns 15% of that applicant, and Sleeper Publications, Inc., of which he is president and a minority stockholder, owns 45%. Sleeper is also editor, publisher, and president of the Mount Holly Herald (the County's largest weekly with a circulation of 12,983), and president of New Jersey Mirror Corporation, publisher of the New Jersey Mirror, a "throwaway" distributed on the local military bases. Sleeper Publications, a commercial printer, has the right of first refusal to buy the only other Mount Holly paper, the weekly Citizen. Fourteen weekly newspapers are published in Burlington County, as well as one daily. Philadelphia, Camden, and Trenton dailies also circulate in the county.

29. Farina's total lack of identification with other media of mass communications entitles him to first preference, and there is no firm basis for distinguishing among County and Halpern-Seltzer in this area, the nearby broadcast interests of the latter balancing the local nonmonopolizing newspaper interests of the former.

Summation

30. County, by virtue of its principals' local residence, is entitled to a clear preference for area familiarity, and there is no basis for distinguishing between Halpern-Seltzer and Farina in this criterion, since both are nonresident and show an equal propensity toward civic participation. Halpern-Seltzer, the only applicant with experience in owning and operating a broadcast station, is deserving of a preference in this area, and Farina's experience with NBC is deemed superior to the brief and non-current experience of one of County's principals. Farina's 100% integration is superior to the full-time integration of a 50% partner of Halpern-Seltzer and to

the full—and part-time integration of three of County's minority stockholders. While Seltzer's integration might be accorded greater weight because of his longer experience, his primary concern at WCOJ has been the technical operation, whereas Farina's experience in network program production should weight equally in his favor. In the criteria of preparation, planning, and programming, Farina again is superior, both for the extensiveness of his contacts and for relating them to his program proposals, which he designed himself. While County's contacts in the area have been deemed adequate, its programming was designed by a consultant and with the advice of counsel, and appears to be largely unrelated to the principals' knowledge of the area's needs. Similarly, Halpern designed that applicant's programming on the basis of his experience at Coatesville, and Seltzer later made contacts in the Burlington area which have not been particularly related to the proposed programming. Finally, we prefer Farina for his better diversification, he being the only applicant not identified with other mass communications media.

31. Thus, Farina has been preferred for preparation, planning, and programming; integration; and diversification. County has won a preference for its area familiarity, and Halpern-Seltzer, for broadcast experience. While Farina lacks area familiarity, as defined in paragraph 21, supra, his extensive contacts and planning indicate more than the typical non-resident's awareness of community needs. Neither is he devoid of experience in broadcasting, for his years spent in NBC's program division, as a "Qualified Production Assistant", should stand him in good stead in developing programming for his own station. Thus, Farina has offered abundant assurance in several criteria, and adequate assurance in each of the others, that a program proposal serving the public interest will be effectuated, and that he may be expected to operate

throughout his license term in the public interest. On the other hand, both County and Halpern-Seltzer have shown weaknesses with respect to one or more of the criteria. The former's lack of experience and the latter's lack of area familiarity have not been compensated by showings under other factors.

County offers only area familiarity and partial integration, unreinforced with a strong showing of preparation to compensate for lack of experience. Similarly, Halpern-Seltzer did little to cure their lack of familiarity with the area to be served and offer us only an experienced broadcaster (with a "satisfactory" record) and partial integration.

32. In view of the foregoing, then, it is concluded that the public interest, convenience, and necessity would best be served through grant of the application of John J. Farina, tra Mt. Holly-Burlington Broadcasting Company, insofar as it requests daytime operation, and denial of the remainder of such application together with those of Halpern-Seltzer and Burlington County.

33. The above determination has been reached without consideration being given to Farina's "Motion For Limited Reopening of Record" filed April 8, 1963, and pleadings responsive thereto, which will, therefore, be dismissed as moot.

Accordingly, it is ordered, this 12th day of June, 1963, that the application of John J. Farina tra Mt. Holly-Burlington Broadcasting Company, to the extent that it seeks a construction permit to establish a new Class III standard broadcast station at Mount Holly, New Jersey, to operate daytime only on the frequency 1460 kc with power of 5 kw, directional antenna, is granted, and otherwise is denied; that the applications of William S. Halpern and Louis N. Seltzer, dba Burlington Broadcasting Company, and of Burlington County Broadcasting Com-

pany, for similar facilities at Burlington and Mount Holly, New Jersey, respectively, are denied; and

It is further ordered, that Farina's "Motion For Limited Reopening of Record" filed April 8, 1963, and its responsive pleadings, are dismissed; and

It is further ordered, that the application (BP-13952) of John J. Farina tra Mt. Holly-Burlington Broadcasting Company is granted, subject to the following condition:

> Pending a final decision in Docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of § 3. 87 of the Commission's Rules are not extended to this authorization, and such operation is precluded.

## CONCURRING STATEMENT OF COMMISSIONER BARTLEY

I concur in the grant of a construction permit to Mt. Holly-Burlington Broadcasting Company for the operation of a daytime-only standard broadcast station in Mount Holly, New Jersey. In light of the facts of record, however, I would have preferred that the grant be made for unlimited time operation as requested by the applicant.

Released: June 14, 1963

## APPENDIX

Rulings on Exceptions to the Initial Decision Exceptions of Halpern and Seltzer, dba Burlington Broadcasting Company

| *Exception No.* | *Ruling* |
|---|---|
| 1, 2, 4-6, 39 | Denied as lacking decisional significance. See paragraph 10 of the Decision. |
| 3 | Granted. See paragraph 9 of the Decision. |
| 7 | Granted, and Finding 20 is enlarged to reflect that Halpern-Seltzer proposes to establish auxiliary studios and offices in Mount Holly. |
| 8, 49-51 | Denied as lacking decisional significance, in view of the non-local residence of Halpern and Seltzer. See paragraph 21 of the Decision. |
| 9 | Denied as cumulative and conclusionary. |
| 10 | Granted in substance. See paragraph 12 of the Decision. |
| 11, 58 | Granted in substance. See paragraph 26 of the Decision. |
| 12 | Granted to the extent that "alleged to have" is deleted from the fourth sentence of Finding 29. |
| 13 | Denied, as unsupported by the record citation. |
| 14-18, 26, 30-33, 36, 37 | Denied as lacking decisional significance. |

| *Exception No.* | *Ruling* |
|---|---|
| 19 | Granted in substance, and footnote 23 to Finding 48 is corrected to reflect that Sleeper Publications, Inc., has paid Browley $2,500 for Browley's agreement to give Sleeper Publications the right of first refusal to purchase the Mount Holly Citizen for an additional $2,500. |
| 20 | Granted. See paragraph 28 of the Decision. |
| 21, 22 | Denied as lacking decisional significance. See paragraph 21 of the Decision. |
| 23, 40 | Denied as cumulative. |
| 24, 25 | Denied. See paragraph 26 of the Decision. |
| 27-29, 37 | Granted in substance. See paragraph 12 and 15 of the Decision. |
| 34, 35, 44, 45 | Denied. These exceptions are based on Halpern-Seltzer's view that, where, on a § 3, 37 question involving possible overlap of 25 mv m contours, expert witnesses reach diametrically opposite results, "the only reasonable conclusion . . . is that there is a possibility that an overlap . . . would exist, and since there was no convincing evidence that such overlap would not occur, Farina had failed to sustain his burden of proof with respect to this issue." So based, the exceptions must fail, for they are founded on an unreasonably harsh view of an applicant's burden of proof, which is but to show, by a preponderance of the evidence, compliance with the rule: That, Farina has done to the satisfaction of the Examiner and the Commission. |

| *Exception No.* | *Ruling* |
|---|---|
| 38 | Granted to the extent reflected in paragraph 10 of the Decision, and denied in the remainder as moot. |
| 41-43 | Denied, for the reasons stated in paragraph 10 of the Decision. |
| 46, 47 | Denied as moot. |
| 48 | Denied, as unsupported by the record or by reason, and as contrary to the facts to which Halpern-Seltzer have not taken exception. |
| 52, 53 | Granted to the extent reflected in paragraph 21 of the Decision. |
| 54, 55 | Denied, as unsupported by the Findings and for lack of record citation. |
| 56 | Denied, as directed to a conclusion not made by the Examiner. However, it is here concluded that contacts made only after the finalization of the program proposal provide no basis for a conclusion that the programming was designed to meet the needs of the community. See Suburban Broadcasters, 30 FCC 1021, 20 RR 951 (1961), affirmed sub nom. Henry v. F. C. C., 302 F. 2d 191 (23 RR 2016). |
| 59-61 | Denied, as conclusions unsupported by the findings, and as to Exception 61 as not permitted by the specified issues. |
| 62 | Granted. See paragraph 10 of the Decision. |
| 63 | Granted. See Decision. |
| 64 | Denied, for the reasons stated in the Decision. |

Exceptions of John J. Farina, trai

Mt. Holly-Burlington Broadcasting Company

| *Exception No.* | *Ruling* |
|---|---|
| 1-8, 11-14, 17, 18, 28, 37, 46-49 | Denied, as lacking decisional significance. |
| 9 | Denied as repetitive of a finding in the paragraph to which exception is taken. |
| 10, 16 | Denied for lack of record citation required by 47 CFR § 1.154. |
| 15 | Denied as conclusionary, speculative, and unwarranted by the facts. |
| 19-25 | Denied in substance as lacking decisional significance, but see paragraph 24 of the Decision. |
| 26, 27 | Denied as lacking decisional significance. Farina claiming no preference for his policies. |
| 29 | Granted in substance. See ruling on Halpern-Seltzer Exception 19. |
| 30 | Granted. See paragraph 28 of the Decision. |
| 31, 32 | Denied as lacking decisional significance. See paragraph 21 of the Decision. |
| 33, 61 | Denied as cumulative. |
| 34 | Granted, and the first sentence of Finding 53 is corrected to read "three of the four individual stockholders of the corporation . . . etc." |
| 35, 36 | Denied. The cited references do not support the exceptions. See paragraph 26 of the Decision. |

| *Exception No.* | *Ruling* |
|---|---|
| 38-43, 77-83, 91 | Granted in substance. See paragraphs 12-15 of the Decision. |
| 44, 45 | Denied, for the reasons stated in paragraphs 19 and 20 of the Decision. |
| 50-57 | Granted in substance. See paragraph 14 of the Decision. |
| 58 | Denied. Interlocutory pleadings are not evidence. |
| 59, 60, 67-71 | Granted, and Findings 103, 106 and 110 are corrected to show that Farina represented in his application, response to Item 3a of Section III, that he had "In excess of $5[illegible],000" "on deposit in a bank or other depository", and that, to the extent that it was on deposit in a *bank* (Item 3b), as distinguished from other depositories, it was in "Fidelity Union Trust, Newark, N.J." In fact, he had a small sum in Fidelity Union Trust, and more than $5[illegible],000 in a cache in his parents' home. The somewhat ambiguous nature of questions 3a and b of Section III of the application (in that question 3b assumes that the amount described in 3a is deposited in a bank), combined with the total absence of any motive or evidence of intent to mislead the Commission, persuades us that Farina was not guilty of a misrepresentation. |
| 62-66 | Denied as moot, in view of the conclusion that each of these proposals is violative of [illegible] 3, 21(b) as filed. See paragraphs 7-8 of the Decision. |

| *Exception No.* | *Ruling* |
|---|---|
| 72-75 | Granted to the extent reflected in paragraph 21 of the Decision. |
| 76 | Granted. See paragraph 22 of the Decision. |
| 84, 85 | Granted to the extent reflected in paragraphs 17 and 18 of the Decision. |
| 86, 87 | Granted in substance. See paragraphs 28 and 29 of the Decision. |
| 88, 89 | Granted. See paragraphs 19 and 20 of the Decision. |
| 90 | Granted. See paragraph 10 of the Decision. |
| 92, 93 | Granted. See Decision. |

Exceptions of the Commission's Broadcast Bureau

| | |
|---|---|
| 1 | Granted, and Finding 13 is deleted in its entirety. |
| 2, 3 | Denied as moot. |
| 4 | Granted in substance. See paragraphs 5-8 of the Decision. |
| 5 | Granted. See paragraphs 9 and 10 of the Decision. |
| 6 | Denied, for the reasons stated in the Decision. |

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17988

WILLIAM S. HALPERN AND LOUIS N. SELTZER d b as BURLINGTON BROADCASTING COMPANY, BURLINGTON, NEW JERSEY, APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

MOUNT HOLLY-BURLINGTON BROADCASTING CO., INC., INTERVENOR

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Appeal from Decision and Order of the
Federal Communications Commission

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Decided March 19, 1963

*Mr. Arthur Scheiner*, with whom *Mr. Philip Bergson* was on the brief, for appellants.

*Mr. Howard Jay Braun*, Counsel, Federal Communications Commission, with whom *Messrs. Max D. Paglin*, General Counsel, and *Daniel R. Ohlbaum*, Associate General Counsel, Federal Communications Commission, were on the brief, for appellee. *Mr. Ernest O. Eisenberg* and *Mrs. Ruth V. Reel*, Counsel, Federal Communications Commission, also entered appearances for appellee.

*Mr. Herbert M. Schalkind*, with whom *Mr. Benito Gaguine* was on the brief, for intervenor.

Before WILBUR K. MILLER, BURGER and WRIGHT, *Circuit Judges*.

BURGER, *Circuit Judges*: This is an appeal from a decision and order of the Federal Communications Commission released June 14, 1963 granting a construction permit to Intervenor John J. Farina trading as Mt. Holly-Burlington Broadcasting and denying the application of appellants and others. The permit covers a new standard broadcast station on 1460 kc, 5 kilowatts, directional antenna, daytime only.

After hearings were concluded the Examiner released an Initial Decision recommending a grant of the construction permit to Burlington County Broadcasting Company, but that applicant has not sought review of the Commission's decision which rejected the Examiner's recommendation and granted the application of Intervenor Farina.

In view of our disposition of the appeal, we need not undertake an extended and detailed discussion of the facts. It is sufficient to point out that in light of the Examiner's doubts as to the reliability of Farina's representations concerning contacts made in testing community needs, added to his lack of candor on finances and representations as to the whereabouts of $53,000 of the $54,000 of claimed "deposits," the problem cannot be disposed of by characterizing Question 3 of the Commission's Application form as "ambiguous." Plainly the answers given were not correct. Farina is a university graduate with an Economics major and we cannot accept the explanation that he understood Question 3 of the Application form to refer to money in banks *and* in family hiding places, when a sum of $54,000 was involved. Even accepting his explanation as to what he thought Questions 3(a), (b) and (c) called for does not by any means dispose of 3(d), which required him to state whether the $54,000 was subject to any

> Conditions of deposit (in trust, savings, subject to check, on time deposit, who may draw on account and for what purpose, or other conditions).

To this question Farina, with the aid of counsel highly experienced in FCC matters, responded:

> Savings and checking accounts may be drawn upon by John J. Farina for any purpose.

We cannot assume that the Application was made out on anything other than what Farina told counsel. Farina does not contend otherwise. This answer was not true, first because at least $53,000 of the sum claimed as "funds on deposit in bank or other depository" was not in any "Savings or checking account," as the answers to 3(b) and 3(d) stated, and second because Farina's testimony to the Examiner was that this large sum was in a family "receptacle" hidden at home and available to him only at the sufferance of his parents. In this context failure to reveal third-party control of a claimed bank account is a grave misrepresentation. The materiality and ultimate impact of the failure to make full and accurate disclosure in the written application must be evaluated in light of seriously challenged representations concerning community contacts noted by the Examiner who conducted the hearings and observed the witnesses first hand. See *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496 (1951).

Although Farina's explanation of the source of his $54,000 is unique if not bizarre, it is neither our function nor purpose now to evaluate the accuracy of his statements; that is primarily for the Commission. Viewing the record as a whole, we cannot escape the conclusion that the Commission failed to make or require adequate inquiry into that subject. As a minimum the Commission should upon remand have the Examiner inquire into (a) corroboration by Farina's parents or others having actual knowledge of the alleged family arrangements for cus-

tody of the $53,000 or $54,000 when the application was executed by Farina; (b) full inquiry into Farina's financing arrangements for future operations; (c) inquiry into the detail of organizational expenses alleged by Farina; (d) inquiry into Farina's surveys on community needs by some means which will satisfy the Commission that interviews claimed were in fact conducted substantially as alleged.

We do not intend to intimate a view that the cash available to Farina is not his own or that his proposed financing program is not appropriate. The present record is inadequate for anyone to make valid conclusions. We retain jurisdiction and remand for the development of a more adequate record.

*Remanded for further proceedings.*

WRIGHT, *Circuit Judge, concurring:* It is with some reluctance that I concur in the court's opinion. The matters which are to be re-investigated on remand have already been passed on by the Commission; and they are matters which fall within its competence. Moreover, I agree with the Commission that its questionnaire is ambiguous, and it is understandable why an applicant would not want to disclose in a public record that there was $54,000 in cash in a receptacle in his home. Nevertheless, further inquiry by the Commission may clear the air and dispel some of the doubts.

That Farina was able to deliver $53,000 in currency in a satchel to his lawyer after filing the application is hardly adequate corroboration for the claimed source, especially in the light of Farina's challenge of claims about consultation with persons who came before the Examiner and denied knowing Farina. The need to know that the financing of Farina's project was not from some undisclosed principal requires this subject to be explored more fully than was done.

## APPENDIX C

The relevant provisions of the Administrative Procedure Act, 5 U.S.C. Section 1001 *et seq.* are:

SECTION 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs or prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extend that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall

be inoperative for an appeal to superior agency authority.

(d) Interim Relief.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of §§ 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

The relevant provisions of the Communications Act of 1934, as amended, 47 U.S.C. Section 151 *et seq.* are:

> SECTION 309(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

> SECTION 402(b). Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

> (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by Section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3) and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under Section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

SECTION 402 (g). At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by Section 10(e) of the Administrative Procedure Act.

# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No. 190

MOUNT HOLLY-BURLINGTON BROADCASTING COMPANY, INC., PETITIONER

*v.*

WILLIAM S. HALPERN & LOUIS N. SELTZER d/b/a BURLINGTON BROADCASTING CO., AND FEDERAL COMMUNICATIONS COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION

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Petitioner seeks certiorari primarily on the ground that the court below improperly substituted its judgment for that of the Commission. Although the Commission is of the view that it reached proper findings based upon an adequate record, and that the decision

below is erroneous, it has determined not to seek review by this Court.

The assignor[1] of the petitioner (hereafter referred to as Farina) was one of three applicants before the Federal Communications Commission for a new radio station in the Mount Holly-Burlington, New Jersey area. The Commission, after a comparative hearing, granted Farina's application, and denied the mutually exclusive applications of respondents Halpern & Seltzer, and of the third applicant (who thereupon dropped out of the proceedings). At issue before the Commission was the truthfulness of Farina's responses to questions on the Commission's application form concerning financial qualifications. Farina made the following responses (J. App. 109)[2]:

> 3. a. Amount of funds on deposit in bank or other depository.
>
> In excess of $54,000.
>
> b. Name and address of the bank in which deposited.
>
> Fidelity Union Trust, Newark, N.J.
>
> c. Name and address of the party in whose name the money is deposited.
>
> "John J. Farina, 321 Summer Ave., Newark, N.J."

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[1] The applicant before the Commission was John J. Farina, trading as Mount Holly-Burlington Broadcasting Company. Farina has since incorporated as Mount Holly-Burlington Broadcasting Company, Inc.

[2] The reference to "J. App." is to the printed joint appendix below.

d. Conditions of deposit (in trust, savings, subject to check, on time deposit, who may draw on account and for what purpose, or other condition).

Savings and checking accounts may be drawn upon by John J. Farina for any purpose.

e. Whether the funds were deposited for the specific purpose of constructing and operating the station.

No.

The Commission found that Farina actually had approximately $54,000 but that almost the entire sum was in a box in his home, only a few hundred dollars being in the bank named by Farina (Pet. 37). However, believing that questions 3(a) and (b) in the application form were somewhat ambiguous, and that Farina had no motive to deceive the Commission, the Commission found (contrary to the hearing examiner) that Farina was not guilty of any misrepresentation (Pet. 37).

Upon the appeal of Halpern & Seltzer, the court of appeals stated that the problem could not be disposed of by characterizing the questions as ambiguous, since the answers given were plainly incorrect (Pet. 40). The court believed that even if Farina could have misunderstood questions 3(a), (b), and (c), the answer to question 3(d) was not true because at least $53,000 of the sum was not in any savings or checking account, and because it was in fact available to Farina only upon the agreement of his parents that he might withdraw it (Pet. 40-41). In

the court's view, the materiality of Farina's failure to make full disclosure in these answers had to be evaluated in the light of the hearing examiner's doubts as to the reliability of his representations of certain community contacts (Pet. 40).* The court of appeals held that the Commission had not made adequate inquiry into the financial question, and remanded the case for fuller inquiry into the actual status of Farina's finances, his plans for financing the new station, the organizational expenses he had incurred, and his community surveys (Pet. 41-42). Judge Wright concurred, believing that further inquiry might be useful, despite the fact that the matters had already been passed on by the Commission, and despite his agreement with the Commission that the questions posed by the application were ambiguous (Pet. 42).

While the Commission believes that its prior decision was correct, it recognizes that a reviewing court has wide power to remand for the making of a fuller record, *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364. It does not appear that the remand ordered in this case was intended to create a new standard for review of Commission decisions. Furthermore, the decision of the court of appeals is, of course, interlocutory. In view of these considera-

* The examiner, it may be noted, did not disqualify Farina, but decided the case upon the comparative needs of the respective communities for a new station, finding that Mount Holly needed a station more than Burlington, and proposing a grant to another Mount Holly applicant who did not participate in the appeal after the Commission made a grant to Farina.

tions, no review by this Court was sought by the government.

Respectfully submitted.

ARCHIBALD COX,
*Solicitor General.*

HENRY GELLER,
*General Counsel,*
*Federal Communications Commission.*

JULY 1964.

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